IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 460 of 2001
(Old No. 2250/1993)

Date of decision : 18th May, 2007

A.F.R. (Approved for Reporting)

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~~Not approved for reporting~~

Date : 18.05.2007

Initials of Judge

Note : Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 460 of 2001
(Old No. 2250 of 1993)

Yashwant S/o Raja Ram
R/o Kaneri, P.S. Karbhi
District Kolhapur (Mah.)
At present L/NK. No. 4172-782, 16
Advance Park C/o 56 A.P.O. ...Appellant

Versus

State ... Respondent

Mr. P.S. Adhikari, learned senior counsel for the appellant
Mr. G.S. Sandhu, learned Govt. Advocate for the respondent-State.

Date of Delivery :- 18th May, 2007

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (for brevity hereinafter referred as Cr.P.C.), is directed against the judgment and order dated 13.12.1993, passed by learned Session Judge, Pithoragarh in S.T. No.6/1991, whereby appellant Yashwant has been convicted under Section 302 I.P.C. and sentenced to imprisonment for life.

2. Brief facts of the case are that the appellant Yashwant, an employee in the Indian Army, posted at Headquarters 16 Advance Park, Dharchula, District Pithoragarh was residing with his family in quarter no.16, Advance Park, which was a temporary structure building. The appellant used to suspect that his wife Smt. Vimal had illicit relationship with someone in the village of her in-laws. The appellant was greatly disturbed by the conduct, character and behaviour of

his wife Vimal and it resulted in bad name to him amontgst his colleagues as well as in the society. It is alleged that on the date of the occurrence, that is, in the intervening night of 29/30.11.1990, the appellant came to his house after seeing a movie and then went to the bed alongwith his wife and children. The appellant was greatly disturbed and could not sleep and at about 1 or 1:30 am, he brought a stone from outside and struck it against the head of his wife Smt. Vimal as a result of which Smt. Vimal sustained injury on her head. It was alleged that the children woke up and the appellant in the meantime got some portion of the wall of his house made to fall. The appellant alongwith his children rushed to the house of Commanding Officer at his residence and then disclosed that due to fall of wall and stones from there, his wife sustained the injury on her head. Thereafter, Smt. Vimal was brought to the Military Hospital where she was declared dead. The appellant also got some injuries and he was also given medical aid. In the meantime, on Hav. Yogendra Nath Pandey reported the matter at the police station, Dharchula vide copy of the report (Ex.Ka.3). It is alleged that a Court of Inquiry was set up against the appellant by Colonel H.B.S. Phokela. Major B.B. Tewari was Presiding Officer of that Court of Inquiry and Cap. I. Phunsok PW3 & Deputy Leader Tenzin Gyurmey PW2 were members of the court of inquiry before whom the confessional statement was made in writing. It was stated in the confessional statement Ex.Ka.16 that he had committed the murder of his wife by striking a stone Ex.1 on her head because of her unchastity. The matter was then further investigated. The Investigating Officer of Police Station Dharchulla prepared the Panchayatnama Ex.Ka.4 of the dead

body. He prepared Photo-lash Ex.Ka.5, Challan Lash Ex.Ka.6, Sample of seal Ex.Ka.7, letter to Chief Medical Officer Ex.K.8. The Investigating Officer then dispatched the dead body of Smt. Vimal to District Hospital, Pithoragarh where post mortem was conducted vide post mortem report Ex.Ka.1. The appellant was arrested and taken into custody. The Investigating Officer also prepared Ex.Ka.12 broken pieces of bangles from inside the room. He also recorded the statement of the witnesses and prepared the site plan Ex.Ka.22. The appellant was brought before the Magistrate where he retracted from his extra judicial confession and made a different statement Ex.ka.1 before the S.D.M., Didihat. After completing the investigation, the I.O. submitted the chargesheet (Ex.Ka.23) before the court.

3. The appellant-accused was charged u/s 302 I.P.C. The accused/appellant denied the charges and claimed his trial.

4. The prosecution in support of its case examined as many as nine witnesses. Dr. R.C. Joshi PW1 was the Medical Officer, who conducted the post mortem of the deceased on 01.12.1990. The Medical Officer proved the postmortem report Ex.ka.1. The prosecution has adduced the evidence of Tensin Gyoremi (PW2) Deputy Leader and Capt. T. Phunsok PW3 of 16th Advance Park. They were members of the Court of Inquiry initiated against the appellant by the Army. Major B.B. Tewari PW8 was Presiding Officer of Court of Inquiry. They proved various statements Ex.ka.17 to 19 including the extra judicial confession. Dr. P. Nath PW4 was the Medical Officer, who examined the injuries of the

appellant on 03.12.1990. Kewalanand Arya PW5 was posted at police station Dharchula as Sub-Inspector on the fateful day. He received an information from the Constable Yogendra Nath of the Military that Smt. Vimal has sustained injuries and died in the military hospital. Accordingly an entry to that effect was made in the G.D. Ex.ka.3. Kewalanand Arya PW5 recovered the stone Ex. 1 by which the head injury was caused to the deceased. He also recovered the broken pieces of bangles of the deceased from the place of occurrence and market it as Ex.ka.12.Jagdish Chandra PW6 is a formal witness, who proved the factum of G.D. entry Ex.ka.13. Major S. Dutta PW7 is also a formal witness, who was posted as Medical Officer in Sector Hospital, Dharchula. He examined Smt. Vimal and found her dead. B.D. Sharma PW9 is the Investigating Officer, who prepared the site-plan Ex.ka.22 and after completing the investigation submitted the chargesheet Ex.ka.23 before the court. The appellant examined Dev Singh DW1 in his defence.

5. The appellant-accused was examined u/s 313 Cr.P.C. and he has pleaded not guilty to the offence. He has stated that he has been falsely implicated in this case. The appellant-accused has further stated that he alongwith his wife and children was inside his house. In the dead hours of the night, the wall of the temporary structure of his house all of a sudden fell down and stone struck on the head of his wife and consequently she died. The appellant has denied in his statement recorded under section 313 Cr.P.C. that his wife was leading an unchaste life and he ever suspected the chastity of his wife. The appellant has

denied the averments made in the extra-judicial confession.

6. The learned Sessions Judge on appreciation of the evidence in the case held the accused/appellant guilty and convicted and sentenced him as mentioned above.

7. We have heard Mr. P.S. Adhikari learned senior counsel for the appellant and Mr. G. S. Sandhu, learned Govt. Advocate for the respondent. Perused the record carefully.

8. At the outset, it needs to be mentioned here that it is not disputed that Smt. Vimal – wife of the appellant died on account of injuries sustained by her in the intervening night of 29/30.11.1990. Dr. R.C. Joshi (PW1), Medical Officer conducted the post mortem of the deceased on 01.12.1990 at about 10:15 a.m. and found following ante-mortem injuries on the person of the deceased:-

> *"Hair soaped in blood on right side skull on temporal area right side touching parietal also. Therefore, lacerated wound 2.5 cm x 1.5 cm x skin deep. The wound was full of blood and was situated (haemotoma present) 2" above above right ear. The membrances were congested and blood vassels were also congested.*

In the opinion of the Medical Officer, the death of the deceased was caused due to coma as a result of head injury (haemotoma). According to the medical officer, this injury could be caused by hitting of a stone on her head. The said injury could be sustained by the deceased on the intervening night of 29/30.11.1990. He has further deposed in his evidence that the ante-

mortem injury sustained by the deceased was sufficient to cause the death in the ordinary course. According to the appellant-accused, in the night between 29/30.11.1990 he alongwith his wife and children was sleeping on the bed. Some stones from the wall of his house fell due to which his wife Smt. Vimal sustained injury on her head and he himself sustained injury on his persons. According to the appellant, the deceased died on account of injuries sustained by her on head due to fall of stones of the wall. Thus, the date, time and place of occurrence are admitted to the appellant-accused. There is no dispute that the deceased sustained the head injury in the night between 29/30.11.1990 at about 1-1:30am and the house of the appellant was situated in 16th Advance Park which comes under the police station Dharchula, Pithoragarh. It is also not disputed that one Hav. Yogendra Nath informed the police about the death of the deceased on 30.11.1990 vide report Ex.ka.13. It was indicated in report Ex.ka.13 that the deceased Smt. Vimal – the wife of the appellant sustained injury due to the sudden fall of stones from the wall of appellant's house. There is no dispute that the appellant accused informed the army authorities about the incident and with the help of the military personnel the wife of the appellant was taken to the military hospital.

9. Now, we have to consider as to who is responsible for causing the death of the deceased Smt. Vimal. There was no eyewitness of the incident and the prosecution case rests upon circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it should be such as to point out only to the guilt of the accused. The evidence should

exclude all other hypothesis except the guilt of the accused. It is often said that through witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no inference other than the guilt can be drawn.

10. The Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622)** while dealing with circumstantial evidence, has held that onus is always on the prosecution to prove that the chain is complete. The condition precedent before conviction could be based on circumstantial evidence were enumerated as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision was also followed in the decisions of the Hon'ble Apex Court in **State of Rajasthan Vs. Rajaram 2003 Cri.L.J. p/3901, State of U.P. Vs. Satish 2005 SCC (Cri) 642 and Ram Singh Vs. Sonia & others 2007 (3) SCC 1.**

11. Keeping in view the above principle of law, we will consider the circumstances projected by the prosecution against the appellant.

12. The prosecution has based its case against the appellant-accused mainly on the basis of extra-judicial confession which is said to have been made by the appellant before the Presiding Officer and Members of the Court of Inquiry constituted by the Commanding Officer of the Unit. The extra-judicial confession was made before three army officers i.e. Major B.B. Tiwari

PW8, Capt. T. Phunsok PW3 and Tensin Gyoremi PW2. These three army officers were holding the proceeding of the Court of Inquiry constituted by the competent authority for determining the cause of death of the deceased Smt. Vimal. There is no dispute that the appellant was a waiter in the army mess and as such he was a military man. Indisputably, the extra-judicial confession was made to the above witnesses who were holding the Court of Inquiry constituted by the competent authority. It is apt to reproduce the extra judicial confession made by the appellant and the same is as under:-

> "मैं न0 7962662 ला नाईक यशवंत धोषित करता हूँ मैं एच क्यू 16 एडवहान्स पार्क में सेवार्थ हूँ मैं यहॉ एक साल 4 महीनों से सर्विस कर रहा हूँ। मैंने यहॉ जुलाई महीने में बच्चे लाया था जुलाई 1990 मे और मेरी पन्नी के संबंध धर में गैर आदमी से थे। मैने अपने गॉव मैं मुझे इज्जत से जीना हराम था। मेरी शादी को 10 साल होता है। मेरे तीन बच्चे है। बड़ी लड़की 6 साल की लड़का साढ़े चार साल का छोटी लड़की ढाई साल की है। मेरे माता पिता है। मेरे दो भाई हैं। बड़ा भाई 3 महार में.....sub है। छोटा भाई सिविल सर्विस में है। मेरी चार बहिन हैं। सभी शादी शुदा हैं। मेरे भाई के बच्चे धर मे है। मेरे ससुराल वाले सास सुसर है। एक साला और तीन साली हैं। सुसर चाचा चाची हैं । एक साला और दो साली हैं। शादी से ही मेरी पत्नी के गैर आदमी से संबंध थे मैने बहुत बरदास्त की तलाक लेने का भी उपाय सोचा लेकिन ससुराल वालो ने एक न सुनी। इस तरह से मैने लालमपुर H.P. Pradesh में भी बच्चे रखे। लेकिन उधर में कुछ नही कर सका। उसकी आदत उधर भी बिगड़ गई मैं चुप रहा धर गॉव में मुझे इज्जत से जीना मुशकिल हुआ। मेरा कलेजा अंदर ही अंदर पाणी पाणी होता था और मैं जुलाई 1990 को 16 एकव्हानस पार्क मे बच्चे लेकर आ गया। यहॉ आने के चार महीने बाद यानी कि 29 नबम्बर 90 को रात हम अपने यूनिट से पिक्चर देखकर आ गये। 10 बजे आने के बाद खाना गरम करके खाकर हम सो गये। बच्चे पहले से सो

गये फिर हम दोनो सो गये दोनो बच्चो को बीच लेकर हम सो गये। मेरी पत्नी सो गई मुझे नींद नही आई और मैं रात को 1 या 1:30 बजे के दौरान मैंने पत्नी के सिर में बाहर से पत्थर लाकर मार दिया और उसका नाक मुॅह बन्द करके उसको खतम किया। तब तक बच्चे जग गये बच्चे अंधेरे में रोने लगे। यह सब बच्चों ने नहीं देखा फिर मैने दीवार गिरा दिया और अपने सिर में हाथ में चोट लगाा लिया। फिर बच्चो को लेकर मैं सी ओ साहब के क्वाटर गया और बताया कि मेरे धर का दीवार गिर गया और मेरी पत्नी के सिर में पत्थर गिर गया। सी ओ साहब सबको आवाज देके चिल्लाये सब को लेकर हमारे क्वाटर में पहुॅच गये और मरी पत्नी को लेकर M.T. में सब ले गये और sec. hospital में पहुॅच गये। अधर मेरी पत्नी को स लाईन ले गये तब तक डाक्टर साहब वहॉ पहुॅच गये और हमारे सी ओ साहब भी पहुॅच गये मुझे पेसन्ट वार्ड में अडमिट किया गया लगभग 30 मिनट के बाद मुझे सी ओ साहब ने और डाक्टर साहब ने बताया कि तुम्हारी पत्नी की मृत्यु हो गई"

13. In order to prove the above-cited extra-judicial confession, the prosecution has adduced the evidence of Major B.B. Tiwari PW8, Capt. T. Phunsok PW3 and Tensin Gyoremi PW2. Major B.B. Tiwari PW8 was Presiding Officer of Court of Inquiry. Capt. T. Phunsok PW3 and Tensin Gyoremi PW2 were members of the Court of Inquiry. All three witnesses have stated in their evidence that the appellant-Yashwant was posted as Waiter in 16th Advance Park, Dharchula Army Unit at the relevant time. He had been residing with his family at Dharchula army unit. Colonel Phokela, Commanding Officer of the Unit constituted a Court of Inquiry regarding the cause of death of the deceased who was the wife of the appellant-a military man. The appellant-accused was brought before the Court of Inquiry before whom the appellant submitted a written statement Ex.ka. 16 confessing his guilt that he

committed the murder of his wife by striking stone on her head while she was asleep. The Court of Inquiry also recorded the statement of other witnesses and also proved the entire proceedings of the Court of Inquiry. These three witnesses have proved that the appellant-accused made an extra judicial confession before them. It is well settled by the catena of decisions rendered by the Hon'ble Supreme Court that extra-judicial confession made even to a stranger cannot be eschewed from consideration if it is found to have been truthful and voluntarily made before a person who has no reason to state falsely. In **Gura Singh Vs. State of Rajasthan 2001 SCC (Cri) 323,** the Hon'ble Supreme Court has held as follows:-

> *"6. It is settled position of law that extra-judicial confession, if true and voluntary, it can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. Relying upon an earlier judgment in* ***Rao Shiv Bahadur Singh Vs. State of Vindhya Pradesh 1954 Criminal .L.J. 910*** *this Court again in* ***Maghar Singh Vs. State of Punjab 1975 SCC (Cri) 479*** *held that the evidence in the form of extra-judicial confession made by the accused to witnesses cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that the*

confession was true and voluntarily made, then the conviction can be founded on such evidence alone. In ***Narayan Singh Vs. State of M.P. 1985 SCC(Cri) 460,*** *this Court cautioned that it is not open to the court trying the criminal case to start with a presumption that extra-judicial confession is always a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. The retraction of extra-judicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon such a confession. In* ***Kishore Chand Vs. State of H.P. 1991 SCC (Cri) 172*** *this Court held that an unambiguous extra-judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of any falsity. However, before relying on the alleged confession, the court has to be satisfied that it is voluntary and is not the result of inducement, threat or promise envisaged under section 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections 25 and 26. The court is required to look into the surrounding circumstances to find out as to whether such confession is not inspired by any improper or collateral consideration or circumvention of law suggesting that it may not be true. All relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinized. To*

> *the same effect is the judgment in* ***Baldev Raj Vs. State of Haryana 1991 SCC(Cri) 659.*** *After referring to the judgment in* ***Piara Singh Vs. State of Punjab 1977 SCC (Cri) 614*** *this Court in* ***Madan Gopal Kakkad Vs. Naval Dubey 1992 SCC(Cri) 589*** *held that the extra-judicial confession which is not obtained by coercion, promise of favour or false hope and is plenary in character and voluntary in nature can be made the basis for conviction even without corroboration."*

The same view has also been followed in the latest decision of the Hon'ble Apex Court in **Ram Singh Vs. Sonia & others 2007 (3) SCC1.**

14. In the light of the enunciation of law as above, we have to examine as to whether the confession made by the appellant to Major B.B. Tiwari PW8, Capt. T. Phunsok PW3 and Tensin Gyoremi PW2 inspires confidence or not. Indisputably, the extra-judicial confession was made by the appellant to Major B.B. Tiwari PW8, Capt. T. Phunsok PW3 and Tensin Gyoremi PW2 prior to his arrest by the police and, therefore, question of it being made under any inducement, threat or promise by the police does not arise. The appellant has retracted from the extra-judicial confession dated 02.12.1990 and gave different version in the statement recorded under section 164 Cr.P.C. which was recorded after 14 days. In the statement recorded under section 164 Cr.P.C. Ex.kha.1, the appellant-accused has stated that the threats were extended to him for making the confessional statement. He further stated in his statement recorded under section 164 Cr.P.C. that

Phukela, Commanding Officer of the Unit called him in the unit where 4-5 officers were present and threats were extended to him for making the confessional statement. The appellant has further stated his statement recorded under section 164 Cr.P.C. that he gave his confession to the Army authorities under the threats. The appellant-accused was examined under section 313 Cr.P.C. in which he has stated that the Commanding Officer was annoyed with him because of the fact that he was doing mess duty and he was submitting the excessive bills. The Commanding Officer has allowed him to keep the family in the quarter, though keeping the family members in the military area was prohibited. The appellant has further stated that after the death of his wife he was taken to a room where two constables and two J.C.Os. armed with weapons extended threats to him for making extra judicial confession before the Court of Inquiry and under the duress, coercion and threat he wrote the extra judicial confession Ex.ka.16.

15. Learned counsel for the appellant-accused contended that the extra judicial confession was obtained under duress, coercion and threat, as such, it cannot be read in evidence. Learned G.A. refuted the contention. Perusal of the record reveals that Major B.B. Tiwari PW8 was Presiding Officer of Court of Inquiry, and Capt. T. Phunsok PW3 & Tensin Gyoremi PW2 were members of the Court of Inquiry and before whom the appellant-accused appeared and gave a written statement Ex.ka.16. If the Commanding Officer would have illegally obtained a confessional statement he could have very well stated that the same fact to the Court of Inquiry. Learned counsel for appellant could

not demonstrate us from the evidence that the Commanding Officer was also present when the appellant was produced before the Court of Inquiry. There is no whisper that the members or presiding officer of the Court of Inquiry had any ill-will against the appellant-accused. Apart from this, the appellant was simply a waiter in the army mess and he was not the incharge of the mess. What we understand that a waiter has to serve the food to the officers who come in the mess. The incharge of the mess has to prepare the accounts and has to submit the bills to the higher authorities. The waiter would not submit the bills directly to the Commanding Officer. Colonel Phukela was the commanding officer of the whole unit at Dharchula before whom a large number of military officers having the rank of Lieutenant Colonel, Major, Caption & JCO had been working. The alleged ill-will as narrated by the appellant-accused towards the C.O. is absolutely insignificant in the facts and circumstances of the case. It is revealed from the evidence that when the appellant-accused informed the C.O. about the injury of his wife due to the fall of wall of his house, the army officers including Colonel Phukela helped him like anything. The army personnel took the appellant and his wife immediately to the hospital to save the life of the deceased. Major S. Dutta PW7 has stated in his evidence that in the night between 29/30.11.1990 he examined Smt. Vimal in the military hospital and found her dead. He prepared a report to that effect which is Ex.ka.14. The said report establishes that the deceased was brought in the army hospital where she was found already dead. After the postmortem of the deceased, the Commanding Officer asked the appellant to perform the last rites of his wife. The army men also

helped him for the same. It is also on record that the appellant was asked to take his children to his village. Thus, the conduct of the army men was not hostile till the appellant made an extra judicial confession. If the Commanding Officer was annoyed with the appellant, he could have threatened him on the very first day when the appellant came to him in the night and would have obtained the extra judicial confession by giving threats to the appellant instead of helping him.

16. Learned counsel for the appellant further contended that the appellant was living in the family quarters of the unit, though, keeping the family in the unit was prohibited. If the extra judicial confession would not have been obtained by the C.O. he would have faced serious consequences for allowing the appellant to keep his family in the unit. Learned G.A. refuted the contention. If the military officer had to take action against the C.O. on the ground that he illegally permitted the appellant to keep his family in the unit against the instructions of the army headquarters that would remain open inspite of the confession of the appellant. If the army headquarter would like to take action against the C.O. of the unit, they would be at liberty even after the extra judicial confession was made by the appellant. We, therefore, do not find any force in the contention of the learned counsel for the appellant.

17. The trial court has rightly held that there was absolutely nothing on record to show that these three officers or any military men had any ill-will against the appellant. There was nothing on record to show that three officers i.e. Major B.B. Tiwari PW8, Capt. T.

Phunsok PW3 and Tensin Gyoremi PW2 gave findings on the dictation of their Commanding Officer. The trial court has further rightly held that there was nothing on record to show that any coercion or inducement was made to the appellant for making extra judicial confession. There is no ground to disbelieve the extra judicial confession made by the appellant before Major B.B. Tiwari PW8, Capt. T. Phunsok PW3 and Tensin Gyoremi PW2. The appellant-accused gave the extra-judicial confession to the aforesaid three army officers in his own handwriting. We have gone through the entire evidence on record and we do not find any cogent reason to disbelieve their evidence. The defence has made a lengthy cross examination, but nothing could be elicited from their cross examination to discredit their testimony. Thus, we have no hesitation in holding that the extra judicial confession made by the appellant before the Court of Inquiry comprising of Major B.B. Tiwari PW8, Capt. T. Phunsok PW3 and Tensin Gyoremi PW2 was voluntary and it was not made under any pressure, threat or duress.

18. Apart from the aforesaid confession, there is discovery of stone Ex.1 by the I.O. at the pointing out of the appellant. Thus, this is an evidence which is admissible under section 27 of the Indian Evidence Act. The prosecution in support of its case examined Kewalanand Arya, Sub-Inspector PW5, who had deposed that he received a telephonic information that the appellant-accused has committed murder of his wife Smt. Vimal and on the said information he reached at the army unit where the appellant was in the custody of army personnel. Thereafter, he was taken in the police custody. The appellant was brought to his

residential quarter from where he picked up a stone Ex.ka10. The same was sealed at the spot and memo was prepared by the I.O. Kawalanand Arya PW5 has stated in his cross examination that he inspected the stone Ex.ka.10 as well as the wall of appellant's house. He has stated that the stone Ex.ka.10 was different from those stones which had allegedly fallen from the wall. The size of the stone Ex.ka.10 was quite different from the stones which fell down from the wall. The said witness was cross examined at length, but nothing could be elicited from his evidence to discredit his testimony. Thus, the evidence of Kewalanand Arya PW5 is credible and cogent. It was pointed out that Ram Gopal Verma and Yogendra Nath were also present at the time of discovery of stone Ex.ka.10, but they were not produced before the court. Both belonged to the army. The evidence of Kewalanand Arya PW5 is credible and cogent about the discovery of stone Ex.ka.10. As such, there is no need to multiply the evidence on the same point. It is a settled position of law that if the testimony of a witness is found credible, his testimony cannot be washed off merely on the ground that other witnesses were not produced. Therefore, the trial court has rightly held that on the pointing of the appellant the stone Ex.ka.10 was recovered and it is admissible under section 27 of the Indian Evidence Act. We are completely in agreement with the finding recorded by the trial court.

19. The next circumstance which goes against the appellant is that the appellant has himself stated in the extra-judicial confession that after seeing the movie they returned to their house and took dinner. Thereafter , they retired to their bed. His two children

were sleeping in between them. According to the statement recorded under section 164 Cr.P.C. the children were not sleeping in between the two i.e. husband and wife. The husband and wife were sleeping on one side and the children were sleeping on the other side. The statement recorded under section 164 Cr.P.C. retracting the extra-judicial confession is not a substantive piece of evidence. It is merely a previous statement of the appellant-accused whereby the extra-judicial confession was retracted. According to the appellant, the wall of his house suddenly collapsed and fell on him as well as on his wife who sustained fatal injury. The children who were sleeping in between the accused and his wife have not sustained even a minor injury on account of falling of wall. Dr. P. Nath PW4 examined the injuries of the appellant on 03.12.1990 and found following injuries on the person of the appellant:-

(1) Abrasion with crust formation present on right side of forehead measuring 2cm x 1.5cm. 4cm above right eye brow and 2cm lateral to the mid line.

(2) Multiple abrasions with crust formation present on middle part of the forehead in an area of 3cm x 2cm, 2cm above left eye brow.

(3) Longitudinal abrasion present on left side of face measuring 2.5cm in length, read in colour, crust has fallen.

(4) Longitudinal abrasion present on left side of face measuring 3cm in lengh, red in colour, crust has fallen, 1cm below from injury no.3.

(5) Longitudinal abrasion present on left side of face measuring 1.5cm in length, red in colour crust has fallen 2cm lateral and below injury no.3.

(6) Abrasion of 0.5cm size in length present on left side of face, colour is red, crust has fallen, 1cm below from injury no.5.

(7) Multiple abrasions with crust formation present on abdominal wall in an area of 6cm x 5cm. 1cm above umbilicus.

(8) Contusion of left little finger present on terminal phalanx, colour in blackish blue.

20. In the opinion of the doctor, the injuries sustained by the appellant-accused were of minor nature. The children of the appellant had not sustained any injury in the said incident. This fact also leads to take an inference that the story as put forward by the appellant is not credible. This circumstance also goes against the appellant. The injuries which the appellant has sustained have been explained by the appellant himself in his extra-judicial confession Ex.ka.16.

21. So far as the motive to commit the murder of Smt. Vimal-the wife of the appellant is concerned, the extra judicial confession Ex.ka. 16 clearly reveals that the deceased had been living an unchaste life since long and she had developed illicit relations with others in the village. The appellant has further confessed that his wife remained unchaste even in the place of his posting. Due to the unchaste character of his wife, he had to feel ashamed and had to suffer humiliation in the society. In the night of occurrence, the appellant

and his wife alongwith their children retired to their bed. The appellant could not sleep and he woke up in the mid night and went outside from where he brought a stone. Thereafter, he struck it on the head of his wife. Learned counsel for the appellant contended that the I.O. had not tried to record the statement of the family members of the appellant with regard to the character of the deceased. It was further contended that the prosecution had not adduced any evidence of the villagers to that effect. We do not find any force in this contention. The appellant-accused himself has categorically stated the reasons in his extra judicial confession as to why he committed the murder of his wife. Thus, the motive to commit the offence is established against the appellant-accused.

22. The appellant-accused had adduced Dev Singh DW1 in his defence. Dev Singh DW1 has stated that he was employed in the diary farm at Dharchula in the year 1990. The said dairy used to supply milk to the army unit. He knew the appellant-accused who had been residing in the family quarters of the unit. He had good relations with appellant, and the deceased and appellant were living peacefully in the said house. The Commanding Officer of the unit had an ill-will against the appellant-accused and he always tried to find faults in the performance of appellant in the mess. During the course of cross-examination, he has stated that he used to visit the house of the appellant and he also used to give milk to the appellant's house. He had further stated in his cross examination that the C.O. and the appellant had never talked with each other. The evidence of the defence is not reliable as he was a casual visitor in the army unit and he may not be

aware about the family affairs of the appellant. The prosecution evidence is credible and cogent. As such, the evidence of Dev Singh DW1 is not reliable.

23. The appellant has set up a story that he alongwith his wife was inside the house and they were sleeping on the bed. In the mid night, the wall of the room, all of a sudden, fell down and the stones hit on the head of his wife and consequently she died. The appellant-accused also denied that his wife was leading an unchaste life and he ever suspected the chastity of his wife. We have discussed earlier the extra-judicial confession and the other attending circumstances of the case which establish that the evidence of the prosecution is credible and cogent. It is also pertinent to mention here that Smt. Vimal sustained only one injury on her head and she did not sustain any abrasion or contusion on other parts of her body and at the same time the appellant-accused sustained a number of injuries on his person. The manner in which the wall is said to have fallen down on the deceased ought to have resulted in more injuries on other parts of her body. It is surprising that a number of stones fell down from the wall and the deceased Smt. Vimal sustained only one injury on her person. Therefore, the explanation offered by the appellant-accused in his defence is wholly unacceptable and unbelievable.

24. In view of the above facts and circumstances of the case coupled with the extra judicial confession made by the appellant established the guilt of the appellant-accused. Learned trial court has rightly held the appellant guilty under section 302 I.P.C. We are completely in agreement with the findings recorded by

the trial court. Therefore, we hold that the prosecution has established the guilt beyond any reasonable doubt against the appellant. We find that the learned trial court has rightly convicted and sentenced the appellant and there is no infirmity in the judgment passed by the trial court.

25. Hence, the appeal is dismissed and the conviction and sentence awarded by the Trial court against the appellant is confirmed.

26. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S. Rawat, J.) (Rajeev Gupta, C.J.)

Dated 18th May, 2007
LSR